



State of Idaho

## DEPARTMENT OF WATER RESOURCES

322 East Front Street, P.O. Box 83720, Boise, ID 83720-0098

Phone: (208) 287-4800 Fax: (208) 287-6700 Web Site: [www.idwr.idaho.gov](http://www.idwr.idaho.gov)

DIRK KEMPTHORNE  
Governor

KARL J. DREHER  
Director

March 18, 2005

LOY PEHRSON  
RT 1 BOX 48  
DARLINGTON ID 83255

MITCHELL SORENSEN  
3871 W 2500 N  
MOORE ID 83255

Dear Sirs:

The Idaho Department of Water Resources (IDWR) received two draft mitigation plans from water users holding water rights in the Big Lost River Basin. Both plans were titled "Consolidated Plan." The Basin 34 Water Users submitted one plan. Another plan was submitted by many of the water users diverting water from the Big Lost River below the Darlington Sinks. Copies of both plans are attached to this letter.

The plans are almost identical in the following areas:

- A total of 6,110 acre feet of water will be made available for mitigation;
- The water will be provided in the following order of preference: managed recharge, storage or stored water, natural flow water rights, and groundwater;
- The watermaster of Water District no. 34 will administer the mitigation plans;
- Ground water users may contribute mitigation water to satisfy their individual mitigation burden or request mitigation water that may be available through the watermaster; and
- All water users in Water District no. 34 may participate in the approved mitigation plan.

By this letter, IDWR approves the provisions of the two plans related to these issues. As conditions of approval, this letter establishes some deadlines for plan implementation and participation. This letter also interprets the Water District 34 – Water Distribution Rules and applies them to the mitigation plans.

Some of the minor components of the draft plans differ. This letter attempts to reconcile the differences.

Finally, specific issues related to implementation may need to be interpreted through further discussions with the water users, perhaps through the Water District no. 34 Advisory Committee.

### **Applicability of the Basin Wide Plan**

A full 6,110 acre feet must be provided to augment the flows of the Big Lost River, and all ground water users in the Big Lost River Basin must be able to participate in the plan. **If 6,110 acre feet of water is not dedicated for mitigation under the consolidated plans by May 15, 2005, and mitigation has been requested, each ground water user will be responsible for providing mitigation water equal to 13% of the average annual volume of ground water he pumped during 2003 and 2004.**

### **Approval of Water for Mitigation**

Before any water is recognized as mitigation water, a water right must authorize the use of the water for mitigation. In most cases, the underlying water right must either be transferred to change the nature of use and other associated components of the water right, or the water right must be leased to the Water Supply Bank and subsequently rented from the Water Supply Bank for mitigation purposes.

If a drought emergency is declared for Butte County and for Custer County, an application for temporary transfer can be filed with IDWR. Approval is limited to one year.

Lease-rental from the Water Supply Bank requires a 10% brokerage fee charged by IDWR.

### **Release of Water**

Rule 50.04.c.i. of the Basin 34 Rules state:

Natural flow will be assumed to be augmented by one-third ( $1/3$ ) of the depletion during the first one-half ( $1/2$ ) of the period of time that any 1905 or earlier water right being called for can not be filled by the natural flow through October 15 of each year. Natural flow will be assumed to be augmented by two-thirds ( $2/3$ ) of the depletion during the second one half ( $1/2$ ) of this period each year.

The period of time within which mitigation must be provided shall be referred to hereafter as the "mitigation period." The mitigation period will begin on the first day the watermaster cannot deliver water rights bearing a 1905 or earlier priority date. Non-delivery is the only standard for determining the beginning date of the mitigation period. A qualified water user must request mitigation before it is required, but the date of request is not used to determine the mitigation period. Non-delivery of a 1905 or earlier priority date starts the mitigation period. The number of days in the mitigation period will be counted from the beginning date until October 15. The midpoint date of the mitigation period will be determined by dividing the number of days in the mitigation period by two.

During the first semester of the mitigation period, up to the first 1/3 of mitigation water will be used to "charge the Big Lost River." This means that the mitigation water will be placed in the Big Lost River below Mackay Reservoir to "wet the channel" through the Darlington Reach and below to deliver surface water to as many water users as possible. Any remaining volume during the first semester will be released to the Big Lost River as a constant flow rate.

The Basin 34 Water Users' plan calls for conversion of the second half volume to a flow rate to be released continuously over the second half. The plan submitted by the users below Darlington calls for the entire release before the futile call at the Moore Diversion.

The purpose of mitigation is to augment the river to compensate for depletions caused by ground water pumping. These depletions can occur both above and below the Darlington Sinks. Some of the gross assumptions in the Basin 34 Rules of Distribution are: Every well causes a 13% depletion to the Big Lost River of the volume pumped from the well; the Big Lost River is depleted equally by ground water pumping along its entire length below the reservoir; and depletions to the Big Lost River from pumping are immediate.

If we assume that ground water pumping instantaneously causes a 13% depletion to surface water flows in the Big Lost River, the river should theoretically be compensated in real time based on the quantity of ground water pumped. Ground water right holders pump more ground water during the heat of the summer because of peak consumptive use (CU) than during late August, September, and October. Higher ground water pumping will cause greater depletions. Releases of water to the Big Lost River should mimic the consumptive use of the crops grown in the Big Lost River Valley. The consumptive use in the Big Lost River Valley can be depicted by a composite of graphical curves each representing water consumption from each of the crops grown weighted by the proportion of the individual crop acreage to the total crop acreage.

The second semester volume should be released on a weekly or biweekly sliding scale based on the following proportion: Volume under the composite CU curve for the period of average release (weekly or biweekly) / (divided by) total volume under the composite CU curve during the second semester. For instance, greater mitigation flows will be released the first week following midpoint than the second week, and greater mitigation flows would be released the second week than the third week. The sliding scale release would continue until the end of the irrigation season.

#### **Character of the Water**

As per the Basin 34 Water Distribution Rules, mitigation water is placed in the Big Lost River to augment the natural flow of the river below Mackay Dam. As a result, mitigation water placed in the Big Lost River below Mackay Dam will be considered natural flow in the river or, alternatively, storage water delivered to the natural flow water right holders. The mitigation water will not be credited solely to losses in the Big Lost River. Whether viewed as natural flow

or as storage released for mitigation, mitigation water will incur its proportionate share of natural flow losses during the water right delivery accounting.

### **Rights Rotated Into the Mackay Reservoir**

The general provisions decreed for Basin 34 limit use of water rotated for credit into the Mackay Reservoir to the lands identified as a place of use by the water right rotated for credit. Water rotated for credit will be recognized for mitigation if used to connect the river (flush the river) below the Darlington Sinks. Water rotated for credit will also be recognized for mitigation if release of the water rotated for credit will mitigate for ground water irrigating the land to which the surface water right rotated for credit is appurtenant. Other proposals to release water rotated for credit for mitigation will not be recognized without prior express approval by IDWR.

### **Watermaster Oversight**

Both plans call for an additional charge for administration of the mitigation water by the watermaster. Title 42, Chapter 6 of the Idaho Code governs water district activities. The statutes do not expressly grant authority to charge ground water users an "administrative fee." The costs of administration by the watermaster probably must be paid by the general assessments of the water district by all the water users within that district. Alternatively, the water users might attempt to pass a resolution at the April 18, 2005 special meeting requiring payment of the administration costs of mitigation by the ground water users.

### **Deadline for Mitigation Plan Participation**

The mitigation plan proposed by the Basin 34 Water Users requires that ground water users must commit to participate in the basin wide mitigation plan on or before April 1, 2005 or incur a participation penalty. The mitigation plan proposed by the users below the Darlington Sinks called for adoption of the mitigation plan at the water district annual meeting and participation by all ground water users unless the water users "opt out." Because mandatory participation in the plans was not discussed at the annual meeting, the "opt out" proposal may not be available. Also, because of the timing of this approval, a deadline of April 1, 2005 may be too soon to attract sufficient water users to the plan.

A special water district meeting is scheduled for April 18, 2005. Participants in the basin wide plan should inform the proponents of the two proposed plans of their desire to participate on or before April 18, 2005. The water users within Water District no. 34 may formally adopt the plan at the special meeting on April 18, 2005, and may require participation unless water users choose to mitigate individually. If a ground water user chooses to participate in the basin wide mitigation plan after April 18, 2005, the ground water user must pay money for his mitigation water and pay a late fee of \$200 or 15% of his individual mitigation burden, whichever is greater, unless there is insufficient water to provide the full 6,110 acre feet of augmentation to the natural flow of the Big Lost River. Funds collected through the payment of

Messrs. Pehrson & Sorensen  
March 18, 2005  
Page 5

late fees will be placed in the accounts of Water District no. 34 and must be used to fund mitigation in future years.

#### **Enforcement**

Any ground water user not mitigating for depletions to the Big Lost River caused by his pumping when mitigation is required should not be allowed to divert ground water. Nonetheless, IDWR must follow the Rules of Conjunctive Management for purposes of enforcement. A water user who has requested mitigation will also have to petition for delivery call before IDWR can curtail use of ground water by a ground water user.

After the 6,110 acre feet of mitigation water is acquired under the consolidated plans, IDWR will issue an order recognizing the details of the plans and making the plan subject to review under the Administrative Procedures Act and IDWR's Rules of Procedure.

The consolidated mitigation plans must be implemented within the context of a larger commitment by all who use and oversee delivery of water to carefully regulate the water rights of the Big Lost River and its tributaries. In this way, the ground water users are assured that their contribution to flows of the Big Lost River are enhanced by proper administration of the water rights decreed in the Snake River Basin Adjudication.

Sincerely,



Gary Spackman

#### **Enclosures**

Cc: Harvey Walker  
Jim Gregory  
Bob Duke, Watermaster  
Ray Rigby